(3)

Supreme Court, U.S.
FILED
MAY 11 2001
OFFICE OF THE CLERK

No. 00-1406

IN THE

Supreme Court of the United States

CHEVRON U.S.A., INC.

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

ANN ELIZABETH REESMAN
Counsel of Record
MCGUINESS, NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

83 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF REASONS FOR GRANTING THE WRIT	6
REASONS FOR GRANTING THE WRIT	7
I. THE DECISION BELOW THWARTS IMPORTANT PUBLIC POLICIES BY CONTRAVENING THE LANGUAGE OF THE ADA AND OVERRIDING EMPLOYERS' STATUTORY RIGHT TO ADOPT JOB-RELATED QUALIFICATION STANDARDS FOR SAFETY REASONS	7
A. The Statutory Language Explicitly Permits Employers To Use "Job-Related" Qualification Standards	7
B. The Ability To Perform a Job Without Incurring Serious Injury or Death Is Properly Characterized as a Job-Related Qualification Standard	9
C. The "Direct Threat" Defense Is One Way, But Not the *Only* Way, of Showing That an Individual Who Would Risk Serious Injury by Performing a Job Is Not "Qualified"	12
D. Public Policy Dictates That Employers Be Permitted To Develop and Apply Adequate Safety Standards	14

TABLE OF CONTENTS—Continued

	Page
II. THE DECISION BELOW IS CONTRARY TO THOSE OF NUMEROUS OTHER CIRCUITS WHICH HAVE RULED THAT INDIVIDUALS WHOSE IMPAIRMENTS WOULD PUT THEM IN DANGER ARE NOT "QUALIFIED" FOR THE JOB IN QUESTION	15
CONCLUSION	18

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999)	3, 13
Bragdon v. Abbott, 524 U.S. 624 (1998)	3
EEOC v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000)	13
Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997)	7, 16
Koshinski v. Decatur Foundry, Inc., 177 F.3d 599 (7th Cir. 1999)	6, 7, 15
LaChance v. Duffy's Draft House, Inc., 146 F.3d 832 (11th Cir. 1998)	16
Leonberger v. Martin Marietta Materials, Inc., 231 F.3d 396 (7th Cir. 2000)	16
Moses v. American Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996)	7, 16
Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999)	3
Reed v. Heil Co., 206 F.3d 1055 (11th Cir. 2000)	16
Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999)	3, 9
Turco v. Hoechst Celanese Corp., 101 F.3d 1090 (5th Cir. 1996)	7, 16, 17
Webb v. Clyde L. Choate Mental Health and Dev. Ctr., 230 F.3d 991 (7th Cir. 2000)	16
FEDERAL STATUTES	
Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*	5
42 U.S.C. §§ 12111-12117	2, 6, 7
42 U.S.C. § 12111(8)	7
42 U.S.C. § 12112(a)	7

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 12112(b)(6)	6, 8
42 U.S.C. § 12113(a)	6, 8, 12, 14
42 U.S.C. § 12113(b)	12
42 U.S.C. § 12113(d)(3)	13
Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*	5
29 U.S.C. § 793	2
STATE STATUTES	
California Fair Employment and Housing Act, Cal. Gov't Code § 12940	5
REGULATIONS	
29 C.F.R. § 1630.2(q) (2000)	12
29 C.F.R. § 1630.2(r) (2000)	13
29 C.F.R. § 1630.10, App. (2000)	12
29 C.F.R. § 1630.15(b) and (c) (2000)	13
56 Fed. Reg. 8578 (1991)	3
LEGISLATIVE HISTORY	
H.R. Conf. Rep. No. 101-558 (1990)	10, 11
H.R. Rep. No. 101-485, pt. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303	9, 10
H.R. Rep. No. 101-485, pt. 3 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445	10
S. Rep. No. 101-116 (1989)	9, 10

IN THE

Supreme Court of the United States

No. 00-1406

CHEVRON U.S.A., INC.
Petitioner,

v.

MARIO ECHAZABAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. Letters of consent from both parties have been filed with the Clerk of the Court. The brief supports the petition for a writ of certiorari.[1]

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

discrimination in employment. Its membership comprises a broad segment of the business community and includes over 350 of the nation's largest private sector employers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117 (ADA). Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities. In addition, EEAC's members include manufacturing companies, oil refineries, airlines, pharmaceutical manufacturers, railroads, health care providers, nuclear power companies, and many others. Many of EEAC's members have adopted safety standards designed to prevent those in their employ from being injured or killed on the job. These standards can—and sometimes will—screen out individuals with disabilities because of disability.

Thus, EEAC's members have a direct interest in the issue presented in this case—whether the ADA permits an employer to impose as a qualification standard a requirement that a job candidate be capable of performing the essential functions of a job safely, that is, without facing a serious risk of injury or death. The court below ruled that an employer can never defend against an ADA challenge either by showing that the plaintiff, if placed in the job, would impose a "direct threat" to his own health or that performing the job safely is an "essential function" rendering the individual

unqualified due to the risk. The Ninth Circuit's interpretation is contrary to the language and spirit of the ADA as well as the decisions of several other circuit courts of appeals.

Because of its interest in the proper application of the ADA, EEAC filed extensive comments in response to the Equal Employment Opportunity Commission's Notice of Proposed Rulemaking on its substantive regulations implementing the employment provisions of the ADA. 56 Fed. Reg. 8578 (1991) (codified at 29 C.F.R. Part 1630). EEAC also has participated as *amicus curiae* in the private sector ADA cases in this Court [2] as well as in the instant case below.

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the concerns of the business community and the significance of this case to employers. EEAC seeks to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not been brought to its attention by the parties.

STATEMENT OF THE CASE

Between 1972 and 1996, Respondent Mario Echazabal worked for various independent maintenance contractors at a Chevron, U.S.A. refinery in El Segundo, California. Pet. App. 2a. In 1992, Echazabal applied for a job with Chevron at the refinery. *Id.* Dr. Philip Baily, a Chevron in-house physician, conducted Echazabal's pre-employment medical examination and determined that Echazabal had "an uncorrectable liver abnormality, and should avoid exposure to

---

[2] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Bragdon v. Abbott*, 524 U.S. 624 (1998).

solvents or other liver toxic chemicals in order not to exacerbate his liver problems." Pet. App. 34a. Chevron rescinded its contingent job offer. Pet. App. 2a. Echazabal subsequently was diagnosed with chronic Hepatitis C, "a viral infection characterized by ongoing liver inflammation." Pet. App. 35a.

In 1995, Echazabal again applied for a job with Chevron. Pet. App. 3a. Dr. Baily's successor, Dr. Kenneth McGill, conducted a pre-employment medical examination. Pet. App. 35a. As part of this examination, Dr. McGill reviewed Echazabal's medical records, which included the results of eight blood sample tests taken between October 1992 and January 1996. Each of these tests revealed elevated levels of liver function enzymes. *Id.*

Dr. McGill also reviewed written "job summaries" which Chevron prepares for every job, listing the functions of the position and the environmental conditions that will be experienced on the job. The summary for the plant helper job Echazabal sought listed "hydrocarbon liquids and vapors, acid, caustic, refinery waste water and sludge, petroleum solvents, oils, greases, and chlorine bleach in the work environment." Pet. App. 36a-37a.

Dr. McGill also spoke and corresponded with Dr. Zelman Weingarten, M.D., Echazabal's own physician. Dr. Weingarten told Dr. McGill that Echazabal should not be exposed to the substances in the refinery. Pet. App. 37a.

Dr. McGill also reviewed Echazabal's medical history, including recent exposures in the refinery. Pet. App. 37a-38a. As a result, "Dr. McGill came to the conclusion that the hydrocarbons, chemicals, and solvents to which Echazabal would be exposed working as a plant helper in the coker unit would be dangerous to his health, or would aggravate his chronic liver condition." Pet. App. 38a. Dr. McGill reviewed his conclusions with Chevron's Medical Director in San Francisco, who agreed with Dr. McGill's determination. *Id.*

Dr. McGill then reported to William Saner, Chevron Personnel Director, his opinion that Echazabal could not be exposed to liver toxic chemicals. *Id.* Dr. McGill also told Saner that Echazabal's own physician, Dr. Weingarten, was of the same opinion. Saner reviewed the same written job summaries as had Dr. McGill. Based on this information and his own knowledge of the job, Saner decided to withdraw the contingent job offer that had been made to Echazabal. Pet. App. 38a-39a.

Chevron notified Echazabal that it was withdrawing his job offer, and also asked Irwin Industries, the contractor that employed Echazabal, to remove him from the position in which he was working in Chevron's refinery, due to the chemical exposure. Pet. App. 39a. Irwin removed Echazabal from the refinery, and sent him to the Long Beach Medical Clinic for evaluation. Pet. App. 40a. There, Dr. Brian Tang, who holds a board certification in occupational medicine and teaches occupational medicine at the University of Southern California Medical School, concluded that "exposure to liver toxins would harm and probably kill Echazabal." *Id.*

Echazabal sued Chevron and Irwin. The district court below granted summary judgment in favor of Chevron on Echazabal's claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, the California Fair Employment and Housing Act, Cal. Gov't Code § 12940, and the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* Pet. App. 32a-57a.

Echazabal appealed to the U.S. Court of Appeals for the Ninth Circuit, which reversed the district court's decision. Pet. App. 1a-29a. In a 2-1 decision, the Ninth Circuit ruled that Chevron could not defend its decision on the basis that Echazabal would be at great risk to his personal safety if it placed him in the job, nor could the company consider him not "qualified" for the job on that account. In dissent, Judge Trott called the majority's decision "Pickwickian" Pet. App.

23a, and "bizarre" Pet. App. 21a, and stated his belief that the resultant circuit conflict would lead to this Court's review. Pet. App. 24a.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision below contravenes the language of the Americans with Disabilities Act (ADA), flouts public policy favoring workplace safety, and conflicts with the decisions of several other circuit courts of appeals. Title I of the ADA, 42 U.S.C. §§ 12111-12117, which generally prohibits discrimination in employment on the basis of disability, provides explicitly that a job qualification standard that screens out an individual or individuals with disabilities may be justified by "business necessity." 42 U.S.C. § 12112(b)(6); 42 U.S.C. § 12113(a). The legislative history corroborates that this provision applies to safety-based standards.

Accordingly, the Equal Employment Opportunity Commission's view that a safety based standard, including one intended to protect the employee him- or herself, can be defended *only* under the statute's "direct threat" provisions, is in error. But the Ninth Circuit's interpretation—that such standards cannot be defended at all—is worse. Public policy dictates that an employer be permitted to develop and apply adequate safety standards, even when they screen out an individual with a disability who would rather ignore the danger.

The Ninth Circuit's interpretation is contrary to those of a number of other circuit courts of appeals holding that individuals whose impairments would put them in danger are not "qualified" for the job in question. In some cases, these courts have concluded that an employee who is unable to perform the essential functions of a job without risk of serious injury is not "qualified" for the job. *E.g., Koshinski v.*

Decatur Foundry, Inc., 177 F.3d 599 (7th Cir. 1999); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997). In others, the courts—sometimes the same courts—have utilized or just mentioned the "direct threat" analysis in reaching essentially the same conclusion. *E.g., Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996); *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090 (5th Cir. 1996).

The Ninth Circuit's decision is contrary to established law and deep-seated public policy, and should be reversed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW THWARTS IMPORTANT PUBLIC POLICIES BY CONTRAVENING THE LANGUAGE OF THE ADA AND OVERRIDING EMPLOYERS' STATUTORY RIGHT TO ADOPT JOB-RELATED QUALIFICATION STANDARDS FOR SAFETY REASONS

A. The Statutory Language Explicitly Permits Employers To Use "Job-Related" Qualification Standards

Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117 (ADA), prohibits discrimination in employment against a "*qualified* individual with a disability" because of the disability. 42 U.S.C. § 12112(a) (emphasis added). The ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added). The employer's judgment as to what job functions are essential *must* be considered in making this determination. *Id.*

The ADA states *twice* that employers may use qualification standards and other selection criteria that are "job-related and

consistent with business necessity" even if they tend to screen out individuals with disabilities. First, Section 102(b) of the ADA, which defines the term "discriminate" as used in the general prohibition of Section 102(a), states in relevant part that:

> (b) CONSTRUCTION-As used in subsection (a), the term "discriminate" includes—
>
> > (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities *unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.*

42 U.S.C. § 12112(b)(6) (emphasis added). Thus, the statutory provision raising the possibility that a qualification standard or selection criterion might discriminate on the basis of disability negates that possibility where the standard or criterion "*is shown to be job-related for the position in question and is consistent with business necessity.*" *Id.*

Second, the statutory language provides a defense in much the same terms, stating:

> IN GENERAL—It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability *has been shown to be job-related and consistent with business necessity*, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

42 U.S.C. § 12113(a) (emphasis added). The inclusion of this defense makes it doubly clear that qualification standards or selection criteria that are "job-related" and "consistent with

business necessity" are permissible under the ADA even if they screen out individuals with disabilities.

B. The Ability To Perform a Job Without Incurring Serious Injury or Death Is Properly Characterized as a Job-Related Qualification Standard

Perhaps the most elemental job qualification is being able to perform the essential job functions, whatever they may be, without seriously injuring or killing oneself. Accordingly, employer safety standards designed to preserve the health and safety of the individual employee, other employees and the public are necessarily "qualification standards" under the ADA. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490 (1999) ("By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria.").

The legislative history of the ADA confirms that the "business necessity" defense is available for qualification standards establishing physical criteria that are tied to safe performance of the job. Both Congressional committees with direct authority over this part of the legislation, the Senate Committee on Labor and Human Resources, and the House Committee on Education and Labor, made this point.

> Under this legislation an employer may still devise physical and other job criteria and tests for a job so long as the criteria or tests are job-related and consistent with business necessity. Thus, for example, an employer can adopt a physical criterion that an applicant be able to lift fifty pounds, if that ability is necessary to an individual's ability to perform the essential function in question.

S. Rep. No. 101-116, at 27 (1989). *See also* H.R. Rep. No. 101-485, pt. 2, at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 338. Both Committees explained this provision as a "requirement that job criteria actually measure ability required by the job" to guard against employment decisions

based on "stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities . . . ." S. Rep. No. 101-116, at 37 (1989); H.R. Rep. No. 101-485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 353. They explained:

> If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criteria must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do an essential function of the job. *If the criteria meets this test, it is nondiscriminatory on its face and it is otherwise lawful under the legislation.*

S. Rep. No. 101-116 (1989), at 37-38; H.R. Rep. No. 101-485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 353-54 (emphasis added).[3] *See also* H.R. Rep. No. 101-485, pt. 3, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 454-55.

Importantly, the ADA's legislative history also confirms that Congress intended for safety-based medical standards to be evaluated under the "business necessity" rule. As the House Committee on the Judiciary stated, "The Committee does not intend for this Act to override any legitimate medical standards established by Federal, State or local law, *or by employers* for applicants for safety or security sensitive positions, if the medical standards are consistent with [the ADA]." H.R. Rep. No. 101-485, pt. 3, at 43 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 466 (emphasis added). *See also* H.R. Rep. No. 101-485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 356-57; H.R. Conf. Rep. No. 101-558, at

[3] The explanation continues that "the criteria may not be used to exclude an applicant with a disability if the criteria can be satisfied by the applicant with a reasonable accommodation. A reasonable accommodation may entail adopting an alternative, less discriminatory criterion." The Committees, did not, however, suggest any standards for how such a criterion could or should be identified or evaluated.

59-60 (1990). Indeed, the House Labor Committee focused specifically on safety-sensitive positions in explaining when medical examinations for employees might be "job-related and consistent with business necessity," stating:

> Section 102(c)(4) prohibits medical exams of employees unless job related and consistent with business necessity. Certain jobs require periodic physicals in order to determine fitness for duty. For example, Federal safety regulations require bus and truck drivers to have a medical exam at least biennially. In certain industries, such as air transportation, physical qualifications for some employees are critical. Those employees, for example, pilots, may have to meet medical standards established by Federal, State or local law or regulation, or otherwise fulfill requirements for obtaining a medical certificate, as a prerequisite for employment. In other instances, because a particular job function may have a significant impact on public safety, e.g. flight attendants, an employee's state of health is important in establishing job qualifications, even though a medical certificate might not be required by law.

H.R. Rep. No. 101-485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 356-57. Similarly, the Conference Report explains:

> [I]n certain industries, such as air transportation, applicants for security and safety related positions are normally chosen on the basis of many competitive factors, some of which are identified as a result of post-offer pre-employment medical examinations. Thus, after the employer receives the results of the post-offer medical examination for applicants for safety or security sensitive positions, only those applicants who meet *the employer's criteria* for the job must receive confirmed offers of employment, so long as the employer does not use those results of the exam to screen out qualified disabled individuals on the basis of disability.

H.R. Conf. Rep. No. 101-558, at 59 (1990) (emphasis added). Thus, the legislative history supports the appropriateness of

the "business necessity" defense to respond to a challenge to a safety-based physical standard.

The regulations of the Equal Employment Opportunity Commission interpreting the ADA define "qualification standards" as "the personal and professional attributes including the skill, experience, education, physical, medical, *safety* and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. § 1630.2(q) (2000) (emphasis added). Similarly, the agency's interpretive guidance regarding the statute's use of the term "qualification standards" states that "[t]his provision is applicable to all types of selection criteria, including *safety requirements* . . . ." 29 C.F.R. § 1630.10, App. (2000) (emphasis added).

C. The "Direct Threat" Defense Is One Way, But Not the *Only* Way, of Showing That an Individual Who Would Risk Serious Injury by Performing a Job Is Not "Qualified"

As noted, the second time the ADA articulates the "business necessity" language it creates an affirmative defense for employers who use "qualification standards, tests, or selection criteria . . ." that tend to screen out individuals with disabilities. 42 U.S.C. § 12113(a). As a subset to this defense, the statute then provides that "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b).

Thus, under the plain language of the statute, an employer may use a qualification standard that protects individual worker's own safety if the standard is "job-related and consistent with business necessity." Where the individual worker is not at risk, but the employer is concerned that someone else might be injured if the worker takes the job, the

employer may use the "no direct threat to others" qualification standard but must meet its specified threshold of proof—that placing the individual in the job would present "a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12113(d)(3).

The EEOC's regulations interpreting the ADA erroneously meld the two concepts into an overarching requirement applicable to all safety-related medical standards, regardless of whether the hazard is to the individual's own safety or that of others. 29 C.F.R. § 1630.2(r) (2000). Had the agency presented this simply as an option, it would be a logical one. An employer who shows that placing a person with a disability into a particular position will impose a significant risk to that person's health certainly has shown that the person is not qualified for the job.

The EEOC does not present it as an option, however. According to the EEOC, meeting the "direct threat" standard is the *only* way an employer can show that a safety-related qualification standard is "job related and consistent with business necessity." 29 C.F.R. § 1630.15(b) and (c) (2000). *See also Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569 (1999) (citing Brief for United States *et al.* as *Amici Curiae*).

Since the EEOC's construction places a greater burden on safety standards than, for example, a typing test, there is a very real question whether the agency's interpretation is valid. *See Albertson's, supra*, at 569 n.15 (noting that "it might be questioned whether the Government's interpretation, which might impose a higher burden on employers to justify safety-related qualification standards than other job requirements, is a sound one"). The Fifth Circuit has conclusively ruled the EEOC's construction unsound. *EEOC v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000) (holding that across-the-board safety based qualification standards need not be subjected to the "direct threat" analysis).

The agency is wrong in requiring that safety standards meet the "direct threat" test. But the Ninth Circuit's conclusion—that the ADA precludes employers from *ever* considering the individual employee's safety—is equally wrong. The ADA provision allowing employers to use qualification standards that are "job-related and consistent with business necessity" contains nothing that excludes safety-related standards. 42 U.S.C. § 12113(a). The Ninth Circuit's holding thus contravenes the clear language of the statute.

D. Public Policy Dictates That Employers Be Permitted To Develop and Apply Adequate Safety Standards

It is difficult to believe that Congress intended the ADA to discourage the development and use of safety standards in the workplace. The Ninth Circuit's ruling that employers cannot establish safety as a qualification standard achieves just such a result. It is important that businesses and industries collectively attempt to self-regulate in the interest of public safety. Businesses may not, however, continue to make the effort to participate in self-regulation if such efforts will actually result in legal liability. Punishing employers who adopt legitimate safety-related criteria will create a disincentive to maintain needed safety standards.

Public policy dictates that employers be permitted to develop and apply safety standards to determine if an employee is qualified. Employers must take preventive measures to ensure that employees are able to perform the essential functions of their jobs in a safe manner—that is, without being killed or injured because of an increased hazard imposed by the employee's own medical condition. An employer that fails to do so will have a difficult time convincing anyone, be it a jury or the Occupational Safety and Health Administration, that it should not be accountable because it was fulfilling its obligation under the ADA. While

compliance with the ADA, as a federal law, may in theory preempt other claims, once an accident has occurred, it will be difficult for an employer to justify its actions when consistent medical advice from both the employer's and the employee's physicians counseled against placing the individual in the job.

Reasonableness is the guiding principle of the ADA. It is not reasonable to forbid an employer from relying on standards designed to protect the safety of its workforce. Public policy warrants an interpretation of the ADA that reconciles the reasons why the ADA was passed: to promote the employment of qualified individuals with disabilities; to ensure that they are qualified based on sound business necessity rather than myth or stereotype; and to protect the safety of the general public.

II. THE DECISION BELOW IS CONTRARY TO THOSE OF NUMEROUS OTHER CIRCUITS WHICH HAVE RULED THAT INDIVIDUALS WHOSE IMPAIRMENTS WOULD PUT THEM IN DANGER ARE NOT "QUALIFIED" FOR THE JOB IN QUESTION

As the Petition indicates, other circuit courts of appeals have concluded that the employer acted properly in not placing or returning an employee to a job likely to do him harm. Several of them have concluded, correctly, that an individual who cannot perform a job without risking serious injury due to an impairment is not "qualified" for the job. The Seventh Circuit has made this point in a number of cases. In *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599 (7th Cir. 1999), the Seventh Circuit ruled that an employee with degenerative arthritis, who could not do the job in question without violating his doctors' recommendations to avoid vibrations and high force and high frequency repetitive tasks, was not "qualified" for the job because he could not perform its essential functions. In a more recent case, the Seventh

Circuit held that a state mental health facility did not violate the ADA when it discharged a psychologist whose asthma prevented him from working with violent or infectious patients. *Webb v. Clyde L. Choate Mental Health and Dev. Ctr.*, 230 F.3d 991 (7th Cir. 2000). *Cf. Leonberger v. Martin Marietta Materials, Inc.*, 231 F.3d 396, 399 (7th Cir. 2000) (upholding summary judgment for employer who discharged front loader operator with sleep apnea, noting that "an employee who is less than fully alert could harm himself and others if he is operating a front loader or many other kinds of heavy industrial equipment."). The Fifth Circuit has concluded that an employee whose job involved an essential function of carrying materials into the shop area was not qualified because he had to stay more than six feet away from welding equipment due to possible electromagnetic interference with his pacemaker. *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997). *See also Reed v. Heil Co.*, 206 F.3d 1055, 1063 (11th Cir. 2000) (holding that a plaintiff with a back condition could not perform essential functions of his job, in part because "test-driving the garbage trucks would painfully aggravate [his] back."). In each of these cases, the employee was physically capable, in the most basic sense, of doing the job in question, but could not as a practical matter do it safely because of the potential effect on his or her medical condition.

In some cases, circuit courts have reached the same conclusion via a "direct threat" analysis. In *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996), the Eleventh Circuit concluded that an individual with epilepsy was not qualified for his job as a product inspector in a manufacturing plant because "[e]ach of Moses's assigned tasks presented grave risks to an employee with a seizure disorder." *Id.* at 447. *See also LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835 (11th Cir. 1998) (retaining an employee with epilepsy in his job as a line cook "would have posed a risk of harm to himself and others . . ."). In *Turco v. Hoechst Celanese Corporation*, 101 F.3d 1090 (5th Cir. 1996), the court mentioned the "direct threat" provision when holding that the plaintiff was "unqualified due to the safety risk that he imposes upon himself and others," noting that "This would be a walking time bomb and woe unto the employer that places an employee in that position." *Id.* at 1094. That some of these circuits also have reached the same outcome without using a "direct threat" analysis illustrates, as discussed earlier, that "direct threat" is merely one way to look at this situation.

The Ninth Circuit's decision—that an employer violates the ADA if it does not allow an employee to place himself in a "direct threat" situation—is contrary both to the decisions of other circuits and the ADA itself. As Judge Trott said in his dissenting opinion, "the majority's holding leads to absurd results." Pet. App. 23a. To the extent that it could force employers to place individuals with disabilities in positions they cannot perform safely, the results could be more than just absurd—they could be tragic.

CONCLUSION

For the foregoing reasons, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the Petition for a Writ of Certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

ANN ELIZABETH REESMAN
Counsel of Record
MCGUINESS, NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council